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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Cal. No. 13967

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS KAPATOS,

Petitioner.

REPLY BRIEF IN ANSWER TO BRIEF FOR THE UNITED STATES OF AMERICA

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—against—

THOMAS KAPATOS,

Appellant.

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In respect to the contention that the petition for a writ of certiorari filed by petitioner was recorded on May 17, 1967; and therefore, out of time under Rules 22(2) and 34(2) of the Rules of this Court, the following circumstances are respectfully set forth:

That on April 10th, 1967, Mr. Justice Harlan extended the time to file the writ of certiorari up to and including May 13, 1967. Petitioner proceeded with appropriate diligence and in good faith.

There was an inordinate delay in the printing of the briefs; and on *May 10, 1967,* petitioner duly mailed forty (40) copies of the brief and included a check in the amount of $100 for the filing of same. See, Exhibit A in the appendix.

That on *May 10, 1967,* three copies of the petition for a writ of certiorari were mailed to the Hon. Thurgood

Marshall, Solicitor General. See, Exhibit B. The receipt thereof, indicating acknowledgment on the *11th day of May, 1967,* is annexed as Exhibit C.

That on *May 10, 1967,* three copies of the petition of certiorari were mailed to the Hon. Robert M. Morgenthau, U. S. Attorney. See, Exhibit D.

Thereafter by telephonic communication, petitioner was informed that the package received from the Post Office arrived on Monday, May 15, 1967, in a damaged condition and that there was no check contained in the package. A letter to that effect was mailed to petitioner. See, Exhibit E.

Thereupon petitioner promptly mailed a money order for $100 via Western Union to defray the cost of filing the petition.

That on May 18, 1967, petitioner received another communication that the original check for $100 was found inside one of the briefs, and the check was returned. See, Exhibit F.

The petition for a writ of certiorari made exclusive reference to the stenographic transcript of the trial record on appeal. By telephonic communication it was indicated that certain supplemental papers were not presented, and they were promptly mailed to the Clerk of the U. S. Supreme Court. An affidavit of service is appended hereto and marked Exhibit G, which indicates that appropriate service was made to the Hon. Thurgood Marshall, Solicitor General, and the Hon. Robert M. Morgenthau, U. S. Attorney, on *May, 10, 1967.*

The In-Court and Show-up Identification

It was urged on Page 5, paragraph 2 of the Memorandum for the U. S. in opposition, that four messengers at the trial identified petitioner as the policeman who stopped the station wagon at the scene of the robbery.

> "Four messengers at the trial identified petitioner as the 'policeman' who stopped the station wagon at the scene of the robbery."

The fact is that Kreisman was the only witness to positively identify the defendant Kapatos in court (T.R. 36).*

In court Figueroa, one of the messengers, testified that the defendant Kapatos:

> "Seems to me he looked like that man" (T.R. 118).

On cross-examination, Figueroa testified in response to the question:

> "Q. So that you can't say positively he is the man, is that right? A. I can't tell you 100%, but many people look like other people and I saw him only that one day" (T.R. 122).

White, another messenger, in respect to the in court identification said:

> "A. I see a man who looks similar to the policeman."

On cross-examination he could not say that he was positively sure (T.R. 160).

Moots, another messenger, testified in court in respect to identifying the defendant Kapatos as follows:

> "A. (After looking around the courtroom) Well, yes, there is one person that I think he looks like, but I am not sure" (T.R. 178).

Two years after the robbery, *on direct examination by the Government-prosecutor,* Kreisman testified that in November of 1965 in the company of two federal agents he identified the defendant Kapatos at the situs at which he worked on Delancey Street underneath the Williamsburgh Bridge in Manhattan (T.R. 37).

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* Reference made to original stenographic transcript of trial record.

Counsel for defendant Kapatos vigorously objected and requested:

> "Mr. Lopez: Your Honor, may I have a continuing objection as to all this testimony of prior identification.
>
> The Court: Yes."

On direct examination by the Government-prosecutor, accompanied by two federal agents of the F.B.I. and Louis Moots, another messenger, Figueroa, identified the defendant Kapatos on Delancey Street underneath the Williamsburgh Bridge, and stated:

> "The day they took me to recognize him, I can only say that the day they took me to recognize him, it seems to me that he looks very much alike to that man who stop us."

Counsel objected to the prior identification, which was overruled (T.R. 120).

White, another messenger, testified *on direct examination by the Government-prosecutor* that in December of 1965, in the company of federal agents, at the location of the Homestead Restaurant in Manhattan, he identified the defendant Kapatos.

Objection was made by counsel for the defense (T.R. 154-155).

Actually, Kreisman was the sole witness who identified the defendant Kapatos in court; and Figueroa, White and Moots were dubious in their in court identifications. However, Kreisman, White and Figueroa made a positive identification of the defendant Kapatos under the aegis of federal agents in an extrajudicial surreptitious confrontation procedure two years after the commission of the crime. The danger implicit in the prior identification procedure is readily apparent that, when Figueroa and White under

sworn testimony, in court, modified their testimony in respect to the identification.

The prior identification testimony was alluded to by the prosecutor in his summation (T.R. 417).

The court, in its charge to the jury in respect to the in court identifications, stated:

> "The law does not require that the identification of the defendant charged be positive beyond any shadow of a doubt. It is required that the identification be established beyond a reasonable doubt."

The prior surreptitious confrontation identifications were used solely to bolster and give strength to Kreisman's in court identification and the dubious identifications made by White and Figueroa.

Petitioner respectfully urges that the surreptitious prior confrontation procedure in totality with the other circumstances of the case were violative of the Due Process Clause of the Fifth Amendment to the U. S. Constitution.

In *U. S.* v. *Billy Joe Wade* (#334, October Term, 1966, decided June 12, 1967), it was made crystal clear that the improper prior identification procedure out of court, pretrial, necessitates counsel protection. However, the *Wade* case and the *Gilbert* v. *California* case (#223, October Term, 1966, decided June 12, 1967), and the *Stovall* v. *Denno* case (#254, October Term, 1966, decided June 12, 1967), explicitly established that counsel requirement was not retroactive. However, in *Stovall* v. *Denno, supra,* consideration of the Due Process Clause was appropriate. See, *Palmer* v. *Peyton,* 359 F. 2d 199. The Due Process Clause of the Fourteenth Amendment was considered in the *Stovall* case and extraordinary and exigent circumstances were controlling, which certainly did not exist in the instant case.

It is respectfully reiterated that the defendant Kapatos was under surveillance for approximately two years and photos of him were shown to the messengers intermittently; and finally in November of 1965 the witness-messengers Kreisman, Figueroa, White and Moots were brought in the company of federal agents to confront the defendant Kapatos surreptitiously for the express purpose of identification. What specifically transpired in this area of identification has not been sufficiently reflected by the record.

The onus of elucidation cannot reflect upon counsel for the defendant, but militates against the omission by the prosecutor for the government. We can only glean from the record the testimony of Mullett presented by the Government-prosecutor as to what probably took place at the extrajudicial identification procedure. See, Page 38-39 of the petition for certiorari.

In this case the pretrial surreptitious confrontation identification procedure introduced on *direct evidence* by the prosecutor grievously tainted the in court identification and unduly gave impetus to Kreisman's credibility and enhanced the effect of the dubious identifications made by Figueroa, White and Moots.

It was held in the *Wade* case in an identification situation where there was indeed a *line-up*:

> "In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

It was also effectively stressed in Justice Brennan's opinion, paragraph 4, in the *Wade* case:

> "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly

riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."

The gravamen of the instant case is that there was no line-up accorded the defendant when a fair line-up procedure was readily available and that the federal agents circumvented a line-up procedure.

It is significant that in the *Wade* case, as well as the *Gilbert* case, both were accorded line-up procedures.

It has been urged in the memorandum, page 5, that:

"(t)here is no constitutional right to be arrested," citing *Hoffa* v. *U. S.*, 385 U.S. 293, 310.* In this case the peculiar circumstances are that in November of 1965, at the extrajudicial confrontation identification procedure, Kreisman had positively identified the defendant Kapatos. Subsequently, accompanied by Moots, Figueroa identified Kapatos at Delancey Street under the Williamsburgh Bridge. In December of 1965, White identified the defendant Kapatos in front of the Homestead Restaurant in Manhattan. Although Kreisman had made a positive identification, there was no arrest, nor was there an arrest when Figueroa identified the defendant subsequently. There was no arrest made after White had identified the defendant Kapatos in December of 1965.

Kapatos was indicted on January 14, 1966, and *was arrested on January 17, 1966,* but whether Kapatos was immediately arrested or there had been an inordinate delay does not reflect upon the fundamental need of a fair and impartial line-up, particularly when such requisite policy exists in the federal criminal administration.

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* ". . . there may be an occasion when a pre-arrest delay may deprive a defendant of a constitutional right if there is a 'showing that the delay . . . was prejudicial or part of a deliberate, purposeful and oppressive design for delay' U. S. v. Rivera, 346 F. 2d 942, 943 (2d Cir. 1965) . . ."

In Justice Black's, dissenting in part and concurring in part, in *U. S. v. Wade, supra,* paragraph 3, pertaining to the instant case, stated:

> "I would reverse WADE'S conviction without further ado had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification."

It is respectfully submitted that if the *Wade* and *Gilbert* cases hadn't been concluded as being not retroactive, the principles enunciated therein would certainly apply to the instant case; therefore, petitioner cannot urge that he should have been accorded the right to counsel under the Sixth Amendment to the U. S. Constitution. However, with equal efficacy, petitioner urges under the totality of the evidence adduced at the trial, that he has been denied Due Process of Law under the Fifth Amendment to the U. S. Constitution.

The impropriety of the prior surreptitious confrontation identification is apparent in this case. The following criteria for ascertainment as to whether the prior identification confrontation offends the Due Process Clause of the Fifth Amendment to the U. S. Constitution, are set forth seriatim:

1. There was a lapse of two years between the alleged act and the show-up confrontation procedure;
2. The defendant Kapatos was not known to the messengers.
3. The inconsistencies between the statements made by the messengers to the police authorities at the time of the crime incident and their subsequent identifications.
4. Positive diversionary assertions by the prosecution to the jury without a scintilla of evidentiary foundation.

5. Four witnesses testified that the man dressed as a policeman was not the defendant Kapatos.

6. The showing of photographs of the defendant Kapatos, which had negative results preceding the show-up identification.

7. The show-up identification procedure in failing to grant the defendant a fair and impartial line-up when the federal authorities could have readily accorded him such line-up consonant with their invariable policy.

8. The glaring inconsistencies in the court testimony of the messengers concerning the circumstances surrounding the identification during the crime incident.

In respect to the opposition on Page 6, there is not an iota of evidence reflecting that the defendant Kapatos was identified in the extrajudicial confrontation identification procedure, "mingling with others in public places."

Fallacious Prosecutorial Testimony

It is of paramount significance that on November 8, 1963, the date of the alleged crime incident, Kreisman had given Federal Agent Edwin Peter Krieger a statement:

> "Kreisman stated that the individual dressed as a policeman was a white male, 35 to 40 years old, and that the other individuals wore masks and another one had on sunglasses. They were all described as white males, 30 to 40 years old, and one of the individuals was wearing blue coveralls and stripes" (T.R. 336).

This recorded description of the perpetrators of the crime pertinently omitted to indicate that there were two men dressed as policeman involved in the crime incident.

Nevertheless, at trial, Kreisman testified that he had observed that the driver of the black sedan wore a police uniform (T.R. 32).

No other witness among the messengers had observed that the driver of the black sedan wore a police uniform. However, the fact that Kreisman merely testified that the driver of the black sedan wore a police uniform and gave no further description in any respect concerning the driver, it was unjustifiable for the government-prosecutor to positively assert in his opening address:

> "You will learn that the man who stayed with the station wagon, the man who was dressed as a police officer, was not the man who originally got out and ordered the station wagon to stop, but was the driver of that unmarked car also wearing a policeman's uniform" (T.R. 13).

In his summation he unequivocally *testified*:

> "And I think the Government has proved beyond any doubt whatever that the man that Rossi and Carey and the vendor were looking at was the redheaded man who was undoubtedly the other man in this robbery" (T.R. 427).

This prosecutorial testimony effectively diverted the jury from assessing the testimony of the witnesses, Mullett, Carey, Rossi and Manessis, who categorically testified that the defendant Kapatos was not the man dressed as a policeman. *Berger* v. *U. S.*, 295 U.S. 78, 88. See, also footnote #4, Mr. Justice White's opinion in *U. S.* v. *Billy Joe Wade*, *supra*.

The prosecutor in effect asserted that the man who was the driver of the black sedan had emerged from the black sedan and apparently switched places with the other man dressed as a policeman; and that he further tried to start the station wagon, was frustrated, then endeavored to solicit the aid of Mullett and was observed by Carey and Rossi, and finally abandoned the station wagon and walked west where he was observed by the frankfurter vendor Manessis.

There is absolutely no evidence adduced at the trial to remotely substantiate such contentions.

Upon the foregoing assertions and the petition for a Writ of Certiorari, it is respectfully prayed that the writ of certiorari be granted in the interest of fundamental justice.

Dated: June of 1967.

Respectfully submitted,

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